

IN UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Criminal Case 03-467-A
	)	
v.	)	Sentencing: April 14, 2005
	)	
WILLIAM ELIOT HURWITZ,	)	Senior Judge Leonard D. Wexler
Defendant.	)	

POSITION ON SENTENCING FACTORS

COMES NOW the United States of America, by and through its attorneys, Paul J. McNulty, United States Attorney for the Eastern District of Virginia, Assistant U.S. Attorney Gene Rossi, and Assistant U.S. Attorney Mark D. Lytle, and hereby files its position on sentencing factors for defendant William Eliot Hurwitz ("Hurwitz"). The government reserves the right to supplement its position after disclosure of the Presentence Report ("PSR") by the U.S. Probation Office.

INTRODUCTION

Pursuant to the following calculations under the advisory United States Sentencing Guidelines ("USSG"), Hurwitz should receive a sentence of life imprisonment (level 48): drug trafficking offenses resulting in both death and serious bodily injuries under USSG § 2D1.1(a)(2) (base offense level 38) and a combined drug quantity under USSG § 2D1.1(c) (base offense level 38); vulnerable victims under USSG § 3A1.1(b)(1) (increase two levels); obstructing or impeding the administration of justice

under USSG § 3C1.1 (increase two levels); aggravating role under USSG § 3B1.1(a) (increase four levels); and abuse of position of trust under USSG § 3B1.3 (increase two levels).

PROCEDURAL POSTURE OF HURWITZ' CASE

On July 27, 2004, the grand jury returned a sixty-two count superseding indictment against Hurwitz, who was charged with the following violations: drug trafficking conspiracy to distribute oxycodone and other pain medications; drug trafficking resulting in deaths and serious bodily injuries; substantive counts of drug trafficking in pain medications; engaging in a continuing criminal enterprise; health care fraud; and criminal forfeiture.

A jury trial was conducted from November 3 to December 8, 2004, during which time the parties called seventy-six witnesses, including sixty-three for the government. On December 15, 2004, the jury returned guilty verdicts on fifty counts in the indictment: Count 1 (drug trafficking conspiracy); Count 2 (Linda Lalmond's death); Count 5 (Carl Shortridge's overdose); Count 6 (Mary Nye's overdose); Counts 8-25, 28-32, 34-35, and 39-59 (substantive drug trafficking counts relating to patients Rennie Buras, Sr., Patrick Huber, Linda Lalmond, Tammy Mullins Rutherford, Patrick Snowden, and Gerald Walker and charged conspirators Rita Carlin, John Farmer, Kevin Fuller, Peter Grant, Cindy Horn, Bret McCarter, William Mullins, Mary Nye, Virginia Santmyers, Kathy Shortridge, Patrick Snowden, Peter Tyskowski,

Timothy Urbani, Mary Urbani, and Robert Woodson).<sup>1</sup> Moreover, the jury returned a special verdict that Hurwitz had committed an offense by abusing a position of public and private trust and using a special skill in facilitating the commission and concealment of the offense.

Hurwitz was acquitted of Counts 60-62 (health care fraud). The jury remained hung on Counts 3-4 (death and overdose) and 7 (drug trafficking), all of which related to Rennie Buras, Sr., and were dismissed. In addition, the jury returned a special verdict that Hurwitz had not committed an offense as an organizer and leader of a criminal activity that involved five or more participants and was otherwise extensive.

#### STATEMENT OF FACTS

To assist this Honorable Court, the government summarizes below a significant portion of the evidence presented during the November 3 to December 16, 2004 jury trial as well as information obtained during the investigation of Hurwitz and other conspirators and drug traffickers.<sup>2</sup> To the extent possible, the government will cite to available trial transcripts ("T.R.") from the Hurwitz trial.

#### I. OPERATION "COTTON CANDY" BACKGROUND.

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<sup>1</sup>The convictions under Counts 2, 5, and 6 each require Hurwitz to be "sentenced to a term of imprisonment of not less than twenty years or more than life," pursuant to 21 U.S.C. § 841(b)(1)(C).

<sup>2</sup>The government wishes to incorporate by reference the statement of facts set forth in its March 8, 2005 opposition to Hurwitz' motions made pursuant to Fed. R. Crim. P. 29, 33, and 34.

The Hurwitz case, which involved a pain management practice that was simply out of control, was a key part of an Organized Crime and Drug Enforcement Task Force ("OCDETF") investigation (Operation "Cotton Candy"), which has been focusing on the illegal distribution by about 60-80 doctors, pharmacists, and patients of pain medication, including the very potent, expensive, and widely-abused oxycodone, also known as "OxyContin," "Oxy," "O.C.," "Hillbilly Heroin," "Killer," and "Coffin." This OCDETF matter, which involves support from the FBI, DEA, ATF, IRS, and Fairfax, Fauquier, and Prince William Counties, as well as numerous other state and local law enforcement in Virginia and elsewhere, has secured over fifty convictions, pleas, or commitment to guilty pleas from cooperating dealers, many of whom were patients of Hurwitz and testified at his trial.

Hurwitz' patients, several of whom had arms covered with needle marks and ulcers as large as a quarter, would schedule monthly meetings with the defendant. Hurwitz would regularly perform perfunctory exams, if at all, and rubber stamp and oftentimes encourage the patients' insatiable demand for excessive and obscene amounts (e.g., 1,600 pills per day) of Oxy or other pills. Numerous patients came in for early refills. Patients were prescribed pills after failing several urine or serum tests. Hurwitz oftentimes completely ignored drug arrests and convictions of his patients. Despite deliberate ignorance

and actual knowledge of obvious patient abuse, misuse, diversion, and distribution of prescribed drugs, Hurwitz continued to issue prescriptions in his patented "to-infinity-and-beyond" manner.<sup>3</sup>

The patients would get their prescriptions filled by pharmacists, who were recommended by Hurwitz. Hurwitz' patients would then abuse the pills and distribute them to countless others.

## II. SUMMARY OF SELECTED TRIAL TESTIMONY.

### A. RENNIE BURAS, SR.

From February 1999 to his death on October 9, 1999, Rennie Buras, Sr., was a patient of Hurwitz. See Trial Exhibits 101-1 to 101-3. Near the end of Mr. Buras' life, Hurwitz prescribed daily dosages of 100 Methadone, 90 Dilaudid, and 6 Seconal. Mr. Buras' son (Rennie Buras, Jr.), his mother Elizabeth Buras, his sister Bonnie Buras Johnson, and his niece Kilee Hoskin, and his former girlfriend Promise Amos testified about the devastating effects of the pills. According to the witnesses, Mr. Buras' last 4-5 months were miserable for him and the family. Because of the pills, Mr. Buras was a zombie, who had severe difficulty talking, walking, driving, or working. The family described a

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<sup>3</sup>At trial, part of Hurwitz' defense was that he was fooled by his uneducated, yet clever, patients, despite numerous undercover tapes that showed that he was quite aware of the extent of his patients' drug trafficking and other criminal activities. Moreover, Hurwitz was highly intelligent and received his education from the most prestigious institutions in the country. Hurwitz attended Harvard and received his bachelor's degree from Columbia. From Stanford, he received a masters and a medical degree. Last, he received a law degree from George Mason University and later became a member of the Virginia Bar.

man who "was not there." On September 6, 1999, Mr. Buras overdosed twice and came within moments of dying.

Shortly after October 5, 1999, Mr. Buras' accidentally took some dosages of morphine, instead of Methadone. The morphine pills were consumed because the pharmacist had placed a Methadone label on a morphine bottle. However, the government's expert testified that the mistake of taking the morphine pills was not the reason for the death of Mr. Buras because the "two pills are essentially equivalent in potency." Ashburn T.R. 106.

B. CINDY HORN AND KEVIN FULLER.

From October 1998 to July 8, 2002, when she was arrested and immediately incarcerated, conspirators Cindy Horn and Kevin Fuller (common law husband) were Hurwitz patients. See Trial Exhibits 105-1 to 105-3. Horn testified that Hurwitz had prescribed to both her and her husband excessive amounts of Oxy, Dilaudid, and other pills on demand. Even though Hurwitz always knew that she and Fuller lived at the same address, Hurwitz accepted a different address from Horn because "he didn't like to prescribe pills to the same address." Horn T.R. 38. Horn picked up prescriptions from the defendant after hours and without a face-to-face visits. Horn T.R. 46. Horn stated that she obtained early refills and more prescriptions by telling Hurwitz false stories, such as: lost prescription at "wedding shower"; "stolen scripts"; "pills locked in safe" were stolen; and "hurting back with the vacuum cleaner." Horn T.R. 45. In

October 1998, Horn almost died during an emergency room visit because the 600 mg of Oxy per day prevented her from feeling the pain from her gallstones. Horn T.R. 48-51. Horn also stated that Hurwitz justified a prescription by a false entry in her records relating to the illness of her father "in Ohio." Horn T.R. 52.

### ARGUMENT

#### I. DEATHS, OVERDOSES, AND DRUG WEIGHT.

The amount of pills relevant to the counts of which Hurwitz was convicted easily meet the requirements for level 38 of the USSG. Moreover, the jury convicted Hurwitz on counts related to the defendant's prescribing of controlled substances that resulted in patient Linda Lalmond's overdose death and Mary Nye's and Carl Shortridge's non-fatal overdoses, all of which require a level 38. The jury also heard testimony about other patient deaths, which were not charged but shed relevant light on Hurwitz' pain practices.

With regard to Mrs. Lalmond, the evidence presented by the government included expert witnesses in the fields of: 1) Pain Management (Dr. Michael Ashburn); 2) Forensic Toxicology (Dr. Carol O'Neil); and 3) Medical Examiner (Dr. Field). Each of them testified that the amount of morphine contained in Mrs. Lalmond's blood was consistent with the amount of morphine prescribed by the defendant and almost certain to result in her death. Dr. O'Neil testified that Mrs. Lalmond's blood morphine level was the

fifth highest level out of 150 morphine related deaths in Northern Virginia over the past five years. Dr. Michael Ashburn testified that the defendant's prescription of morphine to opioid naive Linda Lalmond was an 18 fold increase in the level of opioids she had been receiving previously.

With it's verdict, the jury flatly rejected the defendant's proposal that Mrs. Lalmond possibly died from a heart-related problem as there was no history of heart trouble in Mrs. Lalmond's life.

With regard to the counts related to Carl Shortridge and Mary Nye, there was specific eye witness testimony from relatives that their taking of the narcotics prescribed by the defendant caused an overdose that nearly resulted in each of their deaths. During trial, Kathy Shortridge testified explicitly as to how the defendant ordered her husband to take twelve 30 mg. MSIR all at once while they were in his office. Her description of how Mr. Shortridge literally came within six seconds of dying by simply taking the medications as prescribed by the defendant was telling. Testimony from the Emergency Medical Team that arrived on the scene to treat Mr. Shortridge was also convincing. Mary Nye's husband and children also testified as to how she overdosed on the narcotics prescribed by the defendant. Expert testimony further supported these conclusions.

II. HURWITZ' TESTIMONY IS A BASIS FOR A TWO-LEVEL ENHANCEMENT FOR OBSTRUCTION OF JUSTICE UNDER USSG § 3C1.1



At trial, Hurwitz gave materially false testimony in defense of his criminal behavior, which was soundly condemned by the jury of light of the fifty counts of conviction.

Section 3C1.1 of the USSG permits this Court to impose a two-level upward adjustment if Hurwitz "willfully obstructed or impeded . . . the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction." To apply this enhancement based on a defendant's perjured testimony, the Court "must find three elements: (1) the defendant gave false testimony[;] (2) concerning a material matter[;] with willful intent to deceive (rather than as a result of confusion, mistake, or faulty memory)." United States v. Sun, 278 F.3d 302, 314 (4th Cir. 2002) (affirming obstruction enhancement where defendant attempted to deceive the jury about what he knew and when concerning elements of exporting charges). In concluding that the defendant had testified falsely on several matters, the Sun court stated that "the materiality of [the defendant's testimony]

is obvious. His testimony concerned the heart of the case, i.e., whether he acted with the requisite intent." Id.

The Fourth Circuit affirmed the imposition of an obstruction enhancement against two defendants because "[a]lthough [both defendants] testified at trial to lack of fraudulent intent, the jury rejected their testimony in each instance, necessarily finding it false in order to convict." United States v. Godwin, 272 F.3d 659, 671 (4th Cir. 2001), cert. denied, 535 U.S. 1069 (2002) (citing United States v. Dunnigan, 507 U.S. 87, 96 (1993); United States v. Keith, 42 F.3d 234, 240-41 (4th Cir. 1994)).

Specifically, Hurwitz' testimony contained many false and material statements, all of which were intended to deceive the jury into acquitting him. First, with respect to Patrick Snowden's March 6, 2002 assessment (Trial Exhibit 118-57), Hurwitz lied to the jury when he blamed the prescription of 1,600 pills per day to a "clerical error" committed by either himself or his staff. This excuse was Hurwitz' attempt to shift the blame or explain away his gross actions, which lead to Mr. Snowden's admission into the emergency room for a narcotics overdose in April 2002. In addition, Hurwitz flatly denied that Mr. Snowden had checked into hospitals for overdoses. (Hurwitz T.R. 202) Hurwitz' denial of knowledge about the overdoses was contradicted by the testimony of the patient's wife Christina Snowden, his mother Betty Harlow, and Doctor David Medland, all of whom gave moving testimony about Mr. Snowden's frequent visits

to the emergency room. The jury disregarded Hurwitz' false statements and found him guilty of the charges (Count 43) relating to Mr. Snowden.

Second, in a November 2, 1999 assessment for deceased Rennie Buras, Sr. (Trial Exhibit 100-53), Hurwitz wrote that niece Kilee Hoskin had told Hurwitz that "[s]he was under the impression that the medical examiner had determined that the cause of death was determined to be [a] drug overdose, and that the manner of death [was] suicide."<sup>4</sup> There was no evidence at trial to suggest a suicide. At trial, Ms. Hoskin vehemently denied ever telling Hurwitz that her uncle's death was ruled a suicide by the coroner. Although Ms. Hoskin called the note "a lie" because she had had no knowledge of the coroner's findings, At trial, Hurwitz stuck by his notation and attempted to mislead the jury. Hurwitz was nonetheless found guilty of Count 8, whose circumstances necessarily related to Mr. Buras' assessment.

Third, on a May 29, 2002 undercover tape (Trial Exhibit 9-3) with Robert Woodson, Hurwitz asked Woodson "has Kevin [Fuller] been selling his drugs or selling them through [stepson] Sean [Horn] or selling it through [stepson] Jason [Horn] or something

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<sup>4</sup>At trial, Hurwitz stated that Mary Hippeau had committed suicide in January 1996, during which another Hurwitz patient (Stephen Bresko) also died from a narcotics overdose. In August 1996, the Virginia Board issued an order that found that Hurwitz' prescriptions were the cause of Ms. Hippeau's and Mr. Bresko's deaths. The Board specifically omitted any reference to Hurwitz' suicide theory. See Trial Exhibit 53-8.

like that.”<sup>5</sup> Hurwitz stated and implied that when he was asking these questions and conversing with criminals, he was merely “exploring the subculture” of persons alien to his way of life and upbringing. Given that Hurwitz was found guilty of all of the charges (Counts 13-17) relating to Fuller, this Court should conclude that Hurwitz’ material falsehoods about conspirator Fuller were also rejected by the jury.

Fourth, Hurwitz falsely stated at trial that Harry Huber had approved of the treatment given to son Patrick Huber. In a July 29, 2002 assessment for the son, Hurwitz noted: “Discussion with patient’s father this morning, who expressed confidence in his son’s decision regarding further treatment of his pain.” See Trial Exhibit 106-8. Mr. H. Huber and the son both testified that the father never “expressed confidence” in the son’s treatment, let alone know of the treatment. In addition, Mr. H. Huber had oftentimes express to Hurwitz his deep concern about the adverse effects of Hurwitz’ prescription pills on his daughter Kathryn Huber. Despite the testimony of the Hubers, Hurwitz falsely asserted and implied that the father had approved the son’s treatment. Not surprisingly, the jury ignored Hurwitz’ false statements and found him guilty of the charges (Counts 22-23) relating to the son.

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<sup>5</sup>Sean Horn and Jason Horn pled guilty to Oxy conspiracy charges.

Fifth, Hurwitz stated and implied that he believed conspirator Bret McCarter's "fish story" about how his wife had put cocaine in McCarter's food, which caused McCarter's urine to test positive for cocaine. During November 2001 to March 2002, McCarter failed five urine tests that showed the presence of cocaine. To explain away the last failed test, McCarter told the jury that he made up a "fish story" that his wife had put cocaine in his food. Hurwitz testified that the story could be believed. Hurwitz wrote in an assessment that an "unsavory associate" had put food in McCarter's food.

Moreover, Hurwitz falsely testified that McCarter was "tapered" in light of the five failed urine tests. From April 2002 until June 3, 2002, McCarter's daily dose prescription increased from 20 to 48 pills per day. McCarter was eventually stopped from receiving prescriptions from Hurwitz. But not because of the defendant's actions. McCarter was arrested on federal charges on June 3, 2002 and immediately incarcerated. Hurwitz stated that it would have been "torture" to terminate patients such as McCarter, who was abusing and diverting his pills. But for the incarceration, McCarter would have continued to "torture" both himself and the community with his drug trafficking activities. See Trial Exhibits 109-63 to 109-74. Despite his false statements, the jury found Hurwitz guilty of the charges (Counts 28-30) relating to McCarter.

Sixth, Hurwitz' testimony about conspirator Rita Carlin was

also false and misleading. Hurwitz denied knowledge of drug trafficking activity by Carlin and her family. But, on undercover tapes with conspirator Timothy Urbani, Hurwitz admits that he has knowledge of the drug abuse and trafficking of prescribed pills by Carlin and also by her husband Donald Carlin and son Kelly Carlin, both of whom pled guilty to Oxy conspiracy charges. See Trial Exhibit 9-2. If not for Carlin's arrest and immediate incarceration on August 19, 2002, she would have continued to receive prescriptions from Hurwitz through the end of 2002.

Furthermore, Hurwitz had clear knowledge that Carlin was a drug abuser. In a March 1, 2002 assessment, Hurwitz notes: "Patient [Carlin] reports that she did try, prior to her last visit, to 'shoot-up' her Dilaudid. No are no fresh track marks noted this week." See Trial Exhibit 101-36. Hurwitz denied knowledge of fresh track marks after this assessment, however, Carlin testified that she continued to have fresh track marks throughout the time she was a patient.

In addition, Hurwitz' April 15, 2002 assessment has an April 22, 2002 notation: "Patient [Carlin] reports that originally issued Methadone prescription (paper, not drug) was eaten by her dog! and requests a replacement." See Trial Exhibit 101-40. The exclamation point ("!") was Hurwitz' own admission that he did not believe the "dog" story, which Carlin, of course, testified was a lie. Hurwitz told the jury that the dog story "could be

believed." Hurwitz falsely testified about the tapering of Carlin's dosages and the "dog" story. Despite his false statements, the jury found Hurwitz guilty of the charges (Counts 9-11) relating to Carlin.

Seventh, Hurwitz' testimony about conspirator Peter Grant serves as an additional basis for a Section 3C1.1 enhancement. On January 17, 2002, Hurwitz continued to prescribe narcotics to Grant despite knowing that Grant had tested positive for cocaine use. Furthermore, Grant, whose arms were always covered with needle marks, had been arrested on April 3, 2002, with a gun, crack, and drug paraphernalia. On an April 5, 2002 tape (Trial Exhibits 27-2), Hurwitz and Fairfax County Detective Steve Needles discuss the details of Grant's arrest. Hurwitz continued to issue prescriptions to Grant, who was placed on bond.

On a May 29, 2002 tape (Trial Exhibit 9-3) of a medical visit between Robert Woodson and the defendant, Hurwitz discusses the drug abuse and trafficking by Grant, whom Hurwitz had called a "punk." Later on that day, around 8:00 p.m., the defendant met with Grant, to whom he issued more prescription for opioids. Just seven hours after Grant had visited the defendant's office, Grant was arrested while "passed out" in his car after filling the defendant's prescriptions. Sadly, in the back seat of Grant's car was a four-year-old child, who was surrounded by syringes used for injecting drugs. Grant remained incarcerated after his May 30, 2002 arrest. At trial, Hurwitz denied that he

prescribed to a known drug trafficker. Despite his false statements, the jury found Hurwitz guilty of the charges (Counts 18-19) relating to Grant.

Eighth, Hurwitz' testimony about conspirator Timothy Urbani also justifies a Section 3C1.1 enhancement. Urbani became a patient of Hurwitz after the defendant became aware that Urbani was taking medications from patient Mary Urbani (wife), who was also a conspirator. From the start, Hurwitz knew and had reason to know of illegal use and diversion by the Urbani couple. During most of Urbani's time as a patient, his arms were covered with needle marks and one arm had an ulcer the size of a nickel. On tapes (Trial Exhibit 9-2), Hurwitz and Urbani have numerous discussions only two drug traffickers would have together. They talked about Urbani's drug activities as well as several others. To placate Hurwitz, Urbani told him that he (Urbani) would be Hurwitz' "loyal soldier" in the event law enforcement tried to get Urbani to cooperate. The alleged doctor/patient relationship that Hurwitz and Urbani had could only be described as "perverse." On a May 29, 2002 tape, Urbani told Hurwitz that he had sold pills to Rita Carlin. On a June 10, 2002 tape (Trial Exhibit 9-3), Woodson told Hurwitz that Urbani sold cocaine and that he had previously purchased cocaine from Urbani. On a June 12, 2002 tape, Hurwitz asked Urbani if Bret McCarter was "snitching" on Hurwitz. On a June 27, 2002 tape, Urbani admitted to Hurwitz that he (Urbani) had lied about the allegations



stemming from a March 7, 2002 Oxy trafficking arrest in Tennessee. After hearing this admission and stating "that's not good," Hurwitz nonetheless issued Urbani a prescription. Up until Urbani's July 8, 2002 arrest and immediate incarceration, he was receiving prescriptions from Hurwitz. During his testimony, Hurwitz denied that he prescribed to a known drug trafficker. Despite his false statements, the jury found Hurwitz guilty of the charges (Counts 46-53) relating to Urbani and his wife.

In sum, Hurwitz' testimony easily satisfies all the elements for the imposition of a Section 3C1.1 enhancement. In finding him guilty on fifty counts, the jury "necessarily" found that Hurwitz falsely testified about his treatment of those many patients about whom he stated and implied that he had acted within the bounds of medicine and for a legitimate medical purpose. Moreover, this Court can safely conclude that the jury resoundingly rejected Hurwitz' testimony on Count 1 when he denied that he had conspired with any of his patients.

III. HURWITZ SHOULD RECEIVE FOUR LEVELS FOR AGGRAVATING ROLE.

Notwithstanding the jury's special verdict as it applies to the aggravating role that defendant Hurwitz played in this drug conspiracy, he should receive a four-level enhancement for being a leader/organizer. At trial, the jury was not instructed on the Application Notes available under the United States Sentencing Guidelines related to the leader/organizer enhancement.

Therefore, in considering these notes, the Court should apply such an enhancement as provided for under the USSG. Dr. Hurwitz provided prescriptions for large quantities of controlled substances despite direct knowledge that his patients were abusing and/or selling the medications. On tape, Dr. Hurwitz described to one patient, Robert Woodson, how he envisioned a "Conspiracy of Silence" wherein patients would not testify against him because that could possibly damage the access that they have to the potent narcotics he prescribed. He frequently discussed with his drug-dealing patients, the criminal charges they faced and how they could minimize their exposure to the criminal authorities. As a lawyer, Dr. Hurwitz knew enough to tell certain patients about the exception to the rule of evidence related to statements in furtherance of a conspiracy. In addition, Dr. Hurwitz frequently suggested alibi's to patients of his who had been arrested selling their drugs - stating that perhaps the police were targeting his patients just because of the quantity of narcotics he was prescribing. On one specific

occasion, the defendant attempted to have one patient, Robert Woodson, call another patient, Timothy Urbani, in order to present Mr. Woodson's alibi for allegations that Mr. Urbani faced related to robbing a pharmacy in Fauquier County, Virginia. Dr. Hurwitz had such an extensive education when related to his co-conspirator patients, that he was the sole leader/organizer in this conspiracy.

IV. AS A CHRONIC PAIN MANAGEMENT PHYSICIAN, HURWITZ UTILIZED SPECIAL SKILLS AND VIOLATED THE POSITION OF TRUST HE HAD WITH NUMEROUS PATIENTS.

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Consistent with the jury's verdict on this issue and the overwhelming evidence at trial, the defendant should receive an upward adjustment of two levels for his abuse of a position of trust and use of special skills.

Section 3B1.3 of the USSG states that: "If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment or the offense, increase by 2 levels." Although the upward adjustment for abuse of a position of trust may be employed in addition to an adjustment for aggravating role, the special skill adjustment may not be added on to the role adjustment.

Under USSG § 3B1.3, comment. (n.1), a person in a public or private trust has "substantial discretionary judgment that is ordinarily given considerable deference." In United States v. Adam, 70 F.3d 776, 782 (4th Cir. 1995), the Fourth Circuit

affirmed the imposition of an enhancement for abuse of a position of trust against a physician because "physicians exercise enormous discretion . . . ." Also, in United States v. Singh, 54 F.3d 1182, 1193 (4th Cir. 1995), the Fourth Circuit noted the "unique relationship between a doctor and his patient" in affirming the trust enhancement against a physician, who was convicted of charges based on facts strikingly similar to Hurwitz's case. The Singh defendant had "continued to prescribe addictive drugs" to known addicts, had conducted superficial examinations, had failed to monitor his patients, and had acted with "willful blindness to his patients medical problems and needs." Id. at 1187-93. In the case at bar, Hurwitz' conduct matched and greatly exceeded the egregious behavior upon which the Singh Court upheld the abuse of position of trust enhancement.

Hurwitz' use of special skills also serves as a basis for an upward adjustment of two levels. Under USSG § 3B1.3, comment. (n.3), a special skill refers to: "a skill not possessed by members of the general public and usually requiring substantial education, training, or licensing," such as "pilots, lawyers, doctors, accountants, chemists, and demolition experts.".

Hurwitz's educational level (Columbia, Harvard, Stanford (M.D. and M.S.), and George Mason (J.D.)) is extremely rare for almost any doctor. Moreover, Hurwitz had received extensive training, including the extensive continued medical training (e.g., Doctor William Vilensky ("Red Flags And Loud Gongs" lecture), National Institutes of Health, and Johns Hopkins University) he had received after his 1996 Virginia Board suspension.

Here, in abusing his trust and using special skills, Hurwitz' blatantly violated his Hippocratic oath, i.e., the first duty of a doctor is to do no harm. His criminal behavior was simply disgraceful. His reckless and intentional decisions resulted in the pain, suffering, or death of numerous patients, who dutifully followed his medical advice and, at various times, conspired with him to break the drug laws. Whether Hurwitz was motivated by ego, a desire to fight the law, or greed, he abused his role of doctor and ignored his vast education and training to his own advantage.

Paul Nye, whose wife Mary Nye overdosed as a result of Hurwitz' treatment (Count 6), has put in words a very damning summary of Hurwitz's conduct:

I can understand motives of a young drug dealer on the street. He sees fancy clothes and flashy cars. He sees drug dealing as a way out of his unfortunate situation. It is happening all around him and he doesn't really know any better. Mr. Hurwitz is highly educated and certainly knows better. His education offered him the opportunity to do what the young drug

dealer can only dream about. I believe this makes him more dishonest and despicable th[a]n the young drug dealer. We tend to believe what a doctor says. When you go to the dentist, painful as it may be, you believe he is working in your best interest. Mr. Hurwitz certainly did not consider the best interests of his patients and abused his profession to his own advantage. Through all the heartache, pain and deaths by Mr. Hurwitz, it is his education and knowledge of what he was doing that truly shows his corruption.

Attached Paul Nye Letter, dated January 31, 2005 (Government Exhibit A).

Moreover, Mary Meyer, who is the mother of Linda Lalmond, has written this Court in a very moving and emotional letter (attached Government Exhibit B), dated February 26, 2005, that states that:

I am the mother of Linda Lalmond. My daughter saw Dr. Hurwitz on the T.V. Program 60 minutes. . . . She left home hopeful and smiling, had 2 visits with Dr. Hurwitz [and] was returned home in a container. . . . At that time my husband was suffering with cancer of the pancreas. He spent the last 8 months of his life grieving the loss of his only daughter. Dr. Hurwitz's mother can see her son for the rest of his life. I don't have that privilege with my daughter nor will my great-granddaughter born July 1, 200[], ever know her grandmother. I request that Dr. Hurwitz be sentenced to the fullest extent of the law. Thank you.

In sum, Hurwitz should receive an enhancement for abusing his position and using special skills to conduct his drug trafficking. To whom much is given, much is expected; Hurwitz failed this straightforward test.

V. HURWITZ DELIBERATELY IGNORED THE MEDICAL NEEDS AND OBVIOUS RISKS OF TREATMENT FOR NUMEROUS VULNERABLE VICTIMS, WHOM HE KNEW AND SHOULD HAVE KNOWN WERE IN GRAVE RISK OF HARM FROM THEIR PRESCRIPTION PILLS.

The defendant should receive an upward adjustment of at least two levels (if not four) for his treatment of numerous vulnerable victims, including, but not limited to, patients Linda Lalmond (Counts 2 and 24-25), Carl Shortridge (Count 5), Mary Nye (Counts 6 and 34-35), Rennie Buras, Sr. (Count 8), Gerald Walker (Counts 54-55), Tammy Mullins Rutherford (Count 39), William Mullins (Counts 31-32), Rita Carlin (Counts 9-11), and Patrick Snowden (Count 43).<sup>6</sup>

Section 3A1.1(b)(1) of the USSG states that: "If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by 2 levels." Under USSG §3A1.1, comment. (n.2), a vulnerable victim is "a person (A) who is a victim of the offense of conviction and accountable under §1B1.3 (Relevant Conduct); and (B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct."

In United States v. Singh, 54 F.3d 1182, 1193 n.8 (1995), while remanding on the issue of imposing a § 3A1.1 enhancement because of the lower court's "generalized finding," the Fourth

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<sup>6</sup>Notwithstanding that the jury was hung on Counts 3 (death resulting), 4 (overdose), and 7 (trafficking), we would nonetheless ask the Court under § 1B1.3 (Relevant Conduct) to consider the harm to victim Rennie Buras, Sr., caused by Hurwitz' actions, including the patient's October 9, 1999 death and the two overdoses on September 6, 1999.

Circuit nonetheless noted a court may impose a victim enhancement against a doctor in addition to a trust enhancement depending on "the nature of each patient's addiction, its severity, whether the drug prescribed by the doctor would contribute to or exacerbate that addiction, the availability of the addictive substance, and other similar factors that would distinguish these victims from other victims of this crime."

In United States v. Haines, 32 F.3d 290, 293 (7th Cir. 1994), cited in Singh, 54 F.3d at 1182 n.7, the court cautioned against impermissible double counting when two enhancements are based on the same conduct. However, the Haines court affirmed the "imposition of both § 3A1.1 and § 3B1.3 adjustments because there was evidence to support each enhancement individually." Singh, 54 F.3d at 1193 n.7. If a court finds that patients were not vulnerable "solely because [Hurwitz] was in a position to violate their trust," then both enhancements are appropriate. Id.

In the case at bar, Hurwitz' treatment and cavalier attitude towards numerous patients listed above serves as a strong basis for a 3A1.1(b) enhancement independent of his position of trust. There are numerous particularly susceptible patients whose predicaments were dramatically compounded and exacerbated by Hurwitz' further prescribing, all in an effort to prove Hurwitz' extremely aggressive and illegal approach to pain management.

First, while ignoring numerous "red flags and loud gongs"



suggesting abuse, Hurwitz' continued to issue prescriptions (up to 1,600 pills per day in March 2002 (Trial Exhibit 118-57)) to Patrick Snowden that went "beyond the bounds of reason," according to a statement of the jury foreman contained in a December 21, 2004 newspaper article, which, ironically, was attached to Hurwitz's February 1, 2005 Rule 33 motion. Mr. Snowden's wife (Christina Snowden) and mother (Betty Harlow) testified that they spoke with Hurwitz and his office on numerous occasions to complain about the very severe adverse effects (e.g., several emergency room visits for overdoses and had about ten car wrecks) that the pills were having on the patient. In addition, in April 2002, Emergency Room Doctor David Medland testified that he had had a discussion with Hurwitz about the level of pills issued to Mr. Snowden. Dr. Medland stated that Hurwitz was "not alarmed" by the news of the overdose.

Second, the government proved at trial that Linda Lalmond was opioid naive. See Trial Exhibits 107-1, 107-18, 107-19, 107-20, 107-31, and 107-40. Mrs. Lalmond had been taking small amounts of opioids (i.e, Tylenol#3) before she first saw Hurwitz. She was quite susceptible to Hurwitz' dangerous and risky program of treatment. At trial, Hurwitz admitted that a ten-fold increase in opioids was "very risky." (Hurwitz T.R. 225) Hurwitz further stated that he possessed in his office and was familiar with the highly-regarded Physicians Desk Reference ("PDR"), which is a renowned medical manual that contains the

Food and Drug Administration's ("FDA") packaging insert for each drug. The packaging inserts are based on clinical trials that are approved by the FDA. Hurwitz conceded that the amount of morphine (aka "MSIR") he prescribed to Mrs. Lalmond on her first day was three times the highest recommended dosage in the PDR. Moreover, the amount of MSIR prescribed to her represented an eighteen-fold increase over the opioids (Tylenol#3) she had been taking before she saw Hurwitz. Not surprisingly, Mrs. Lalmond died in June 2000, within about thirty-three hours after first seeing Hurwitz. In sum, based on his treatment of Mrs. Lalmond alone, Hurwitz should receive an additional two levels because she was "unusually vulnerable" and "particularly susceptible" to Hurwitz' criminal conduct within the meaning of § 3A1.1, comment. (n.2).

Third, Hurwitz did not learn from his fatal June 2000 mistake with respect to Mrs. Lalmond. In February 2001, Carl Shortridge was opioid naive, too, before he first saw Hurwitz, who seemed to be experimenting with this patient, if not others,

to prove his theory of pain management.<sup>7</sup>

On the first day, Hurwitz recklessly prescribed to him the same dose he had issued to Mrs. Lalmond, i.e., three times the highest recommended dosage in the PDR. Hurwitz prescribed a twenty-two-fold increase in daily opioid dose for C. Shortridge. During the morning of the second day, Hurwitz had the patient consume twelve MSIR tablets all at once. The twelve tablets had remained from

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<sup>7</sup>Although the jury acquitted the defendant of Count 38, which related to patient Charles Raines, Jr., Hurwitz engaged in illegal detoxification in his home of the patient, whom he left alone with no monitoring for hours and almost killed him. In a January 17, 2000 email to the Virginia Board of Medicine, the Mr. Raines described in graphic terms this surreal experience: “I was scared to death”; “[Hurwitz] strongly told me not to seek help elsewhere”; “[Hurwitz] obviously has me addicted to [Dilaudid]”; “I think [Hurwitz] is trying to kill me.” In July 2003, the Board concluded that this “home detox” approach and his treatment of Mr. Raines was “substandard and grossly careless.” One can only conclude that Hurwitz was going to use the patient as his guinea pig.

the patient's previous day's allotment. According to the testimony of Kathy Shortridge, C. Shortridge could barely walk out of the office that morning. Within about thirty-three hours of first seeing Hurwitz, C. Shortridge had a dramatic overdose at his motel and came within "six seconds" of death, according to the testimony of EMT Sandra Caple. See Trial Exhibits 116-7, 116-9, 116-13 and 116-17.

Fourth, the life of Rennie Buras, Sr., who died on October 9, 1999, took a dramatic turn for the worse beginning in June 1999, when Hurwitz rapidly increased the patient's opioid dosages for no reason. After June 1999, family testified that he walked around like he was "retarded" and heavily medicated. On September 6, 1999, he overdosed twice (2:00 a.m. and 10:00 a.m.) from taking the pills prescribed to him by Hurwitz. Mr. Buras was another patient, whose life was fatally ruined by Hurwitz. See Trial Exhibits 100-8, 100-14, 100-32, 100-38, 100-44, 100-51, 100-67, 100-69, and 100-70.

Fifth, the testimony at trial established that Hurwitz knew and acted with deliberate ignorance to the tragic and fatal final days of Mary Nye's life. See Trial Exhibits 113-7, 113-19, and 113-21. In November 2001, husband Paul Nye testified that he spoke with Hurwitz, who essentially was told that "Mary was not functional and spending all her time in bed." Hurwitz' prescription for Methadone caused Mrs. Nye to have an overdose on September 12, 2002. On the subject of Mrs. Nye's overdose,

Hurwitz skillfully redacted his assessment notes and avoided any mention of an "overdose," which was documented in the Prince William County Hospital Admission records. See Trial Exhibits 113-10 and 113-26.

Hurwitz' continued treatment of Mrs. Nye, who was placed in a susceptible position because of Hurwitz' illegal behavior, and his blatant lie ("the Methadone had nothing to do with her overdose") to her daughters Erin Nye and Rachel Nye placed her in a vulnerable position that nearly cost her to perish in September-October 2002. On October 31, 2002, Hurwitz prescribed propoxyphene (Darvon) and diazepam (Valium), both Schedule IV controlled substances, over the telephone to Mary Nye without an office visit. Mrs. Nye perished on November 4, 2002, although the jury did not find Hurwitz guilty of the prescriptions on October 31. However, those drugs were found in her system. On November 5, 2002, Hurwitz called the home and callously asked Sally Barille (Paul Nye's sister) if Mrs. Nye had committed suicide.<sup>8</sup>

Sixth, Hurwitz' treatment of Tammy Mullins Rutherford, who gave birth to an addicted baby, was also beyond the pale.<sup>9</sup>

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<sup>8</sup>Hurwitz admitted on the stand that suicide is the "best defense" against a charge of over prescribing medications. Hurwitz tried to invoke the "suicide" defense for the deaths of Rennie Buras, Sr. (Trial Exhibit 100-54) and Mary Hippeau, who died in January 1996 due to Hurwitz' prescribed pills.

<sup>9</sup>Although not charged in the indictment or referred to at trial, Hurwitz had two other pregnant patients, who received similar and comparable amounts of pills that were outside the

During the summer of 2000, she told the defendant that she was pregnant and wanted to reduce her medications. Ms. Mullins' dosages were not reduced by defendant but rapidly increased to a very high level.

Ms. Mullins was also unable to reduce her medications because she was addicted. Attorney Sharon Filipour testified that in June 2002 the defendant was directly told about Ms. Mullins abusive and addictive behavior: a disheveled home life, running out of medications early; found unconscious frequently on the toilet while the floor around the toilet was burned because of her cigarettes; and a child finding her in the bathtub with a syringe in the leg. The defendant turned a deliberate and blind eye to Ms. Filipour's information about Ms. Mullins' chaotic home life. As usual, Hurwitz continued to illegally prescribe potent narcotics to Ms. Mullins.

On December 4, 2000, in McLean, Virginia, Hurwitz issued an excessive prescription for Oxy (up to 30 pills per day) to Ms. Mullins, whom Hurwitz knew was in the thirty-third week of pregnancy. On December 13, 2000, Hurwitz' prescription resulted in Ms. Mullins' baby being born with an addiction to oxycodone. Hurwitz testified that his prescriptions to Ms. Mullins were proper and that the baby did not suffer long-term damage. But, the delivery records (Trial Exhibit 117-37) for the baby show

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bounds of medicine. These two patients should also be considered under §§ 1B1.3 and 3A1.1, comment. (n.2).

severe and acute pain caused to the baby from the mother's abuse and addiction. The baby was born premature weighing just 3 lbs. and addicted on December 13, 2000. The hospital nurses notes state: "infant very jittery, tremors, and very irritable." Hurwitz was acutely aware of Ms. Mullins' drug problems during the pregnancy, yet he continued to prescribe excessive amounts of pills to her. See also Trial Exhibits 111-13, 111-14, 111-15, 111-24, 111-25, 111-26, and 111-37. In sum, both the patient mother and the baby were particularly vulnerable victims of Hurwitz' illegal conduct.

Seventh, with respect to the remaining vulnerable victims listed, Hurwitz continued his cavalier attitude towards their treatment. For example, Hurwitz' treatment of William Mullins was profoundly egregious and worthy of detailed analysis. At age twenty-three, W. Mullins first saw Hurwitz in September 1999. W. Mullins testified that in the first few months he was a patient of the defendant, he tested positive for cocaine on several occasions and had track marks on his arms from injections. After Hurwitz examined W. Mullins' track marks on his arms, the defendant told him that he (Hurwitz) had to find a way to "cover his ass" to continue to treat him. They decided that addiction counseling was appropriate. W. Mullins also testified that he went to an addiction counselor on only about three occasions total, that he continued to use cocaine and other illicit drugs, and continued to inject and sell his medications during his

entire time as a patient of Hurwitz, who always had actual knowledge of the patient's abuse and misuse of pills.

Hurwitz also had received an April 2, 2000 letter (Trial Exhibit 112-33) about W. Mullins in which a concerned family member had called W. Mullins "out of control" and a "pin cushion," whose arms were covered with obvious track marks.

Betty Jo Funkhouser (W. Mullins' aunt) testified that she actually observed her nephew shooting up OxyContin. She also saw fresh needle marks that looked like "railroad tracks" on his arms. Ms. Funkhouser testified that "you would have to be blind to miss the marks." She further stated that after she observed the marks, she called Hurwitz and told him that he needed to check W. Mullins' arms for needles marks as he was shooting up the drugs prescribed to him. Betty Jo Funkhouser, who also had been an addict, stated that W. Mullins was taking too many pills "even for a junky." By December 2000, Hurwitz was prescribing this obviously addicted and "out of control" patient more than 1,800 OxyContin 80mg tablets per month. But for his arrest and incarceration in March 2001, W. Mullins would have remained a Hurwitz patient.<sup>10</sup>

With respect to Rita Carlin, Hurwitz recklessly prescribed her Dilaudid in the spring/summer of 2002 after he had become

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<sup>10</sup>W. Mullins' conspirator parents (Curtis Mullins and Carol Mullins) have also pled guilty to Oxy trafficking charges. The father and mother became patients of Hurwitz in March 2001 and April 2001, respectively, which was around the time of W. Mullins' arrest and incarceration.



aware that she was shooting up the Dilaudid. Hurwitz admitted on an undercover tape that he knew she was shooting up Dilaudid, yet, he continued to prescribe her the same medication that she was abusing. R. Carlin and W. Mullins were unusually vulnerable victims, both of whom stopped receiving prescriptions from Hurwitz only because they were incarcerated. While under Hurwitz' care, they did not need more pain pills. W. Mullins, R. Carlin, and other patients desperately needed counseling and treatment for their addictions. Hurwitz engaged in a criminal pattern of never taking steps to effectively insure that such

uniquely vulnerable patients received addiction counseling and treatment.

CONCLUSION

For the foregoing reasons, the United States submits that the PSR should recommend life imprisonment (USSG level 48), which this Court should impose pursuant to the sentencing factors set forth in 18 U.S.C. § 3553(a).

Respectfully submitted,

Paul J. McNulty  
United States Attorney

By:

Gene Rossi  
Assistant U.S. Attorney  
Mark D. Lytle  
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing POSITION ON SENTENCING FACTORS was served (via email) on Tuesday 8 March 2005 and upon:

Marvin D. Miller, Esquire  
1203 Duke Street  
Alexandria, VA 22314

Patrick S. Hallinan, Esquire  
Kenneth Wine, Esquire  
HALLINAN & WINE  
345 Franklin Street  
San Francisco, CA 94102

Chambers of Senior Judge Leonard D. Wexler; and  
Mary Beth Simpson, U.S. Probation Officer

Gene Rossi  
Assistant U.S. Attorney  
Office of the U.S. Attorney  
2100 Jamieson Avenue  
Alexandria, VA 22314-5794  
703-299-3965 (Tel)